IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

VALERIA TANCO and SOPHY JESTY, IJPE DeKOE and THOMAS KOSTURA, and JOHNO ESPEJO and MATTHEW MANSELL,	)	
Plaintiffs,	)	Case No. 3:13-cv-01159
v.	)	Judge Aleta A. Trauger
WILLIAM E. "BILL" HASLAM, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY PENDING APPEAL

Plaintiffs respectfully file this Memorandum in opposition to Defendants' Motion for Stay Pending Appeal (Docket No. 72).[1]

The ruling that the Defendants seek—issuance of a stay of this Court's preliminary order while the case proceeds on appeal—would deny Plaintiffs what they have already demonstrated to this Court they are entitled to receive: immediate relief. Indeed, issuing a stay of a preliminary injunction defeats the entire purpose of granting a preliminary injunction—to protect Plaintiffs' rights while their lawsuit is pending.

Defendants base their request for a stay primarily on the issuance of stays pending appeal in several other constitutional challenges to state laws excluding same-sex couples from civil marriage. *See* Defendants' Memorandum of Law in Support of Motion for Stay Pending Appeal at 2 (Doc. No. 73) ("Def. Mem.") (citing *Herbert v. Kitchen*, No. 13A687, 571 U.S. ___, 2014

[1] In the interest of judicial efficiency, Plaintiffs respectfully request that this Court deem the evidence that Plaintiffs submitted in support of their motion for preliminary injunction to be submitted for purposes of opposing Defendants' motion for a stay pending appeal.

WL 30367 (Jan. 6, 2014); *De Leon v. Perry*, No. SA-13-CA-00982-OLG (W.D. Tex. Feb. 26, 2014) (Doc. No. 58-1); *Bostic v. Rainey*, No. 2:13-cv-395-JGH (E.D. Va. Feb. 13, 2014) (Doc. No. 56-1); and *Bishop v. Holder*, No. 04-cv-848-TCK-TLW (N.D. Okla. Jan. 14, 2014) (Doc. No. 272)). Defendants ignore, however, a critical and dispositive difference between the injunctions at issue in those cases and the Court's injunction in this case.

The cases cited by Defendants all involved injunctions that would have required states to issue marriage licenses to *all otherwise-qualified same-sex couples in a state* or to recognize all married same-sex couples' marriages within a state. Here, Plaintiffs did not request, and the Court did not enter, such all-encompassing relief. Instead, the preliminary injunction in this case requires only that the State of Tennessee refrain from enforcing its Anti-Recognition Laws against the three Plaintiff couples while this litigation remains pending. *Cf. Obergefell v. Wymyslo*, No. 1:13-CV-501, 2013 WL 7869139, *23 (S.D. Ohio Dec. 23, 2013) (barring the State of Ohio from enforcing that State's anti-recognition laws only with respect to the plaintiffs in that action).

Because the limited preliminary injunction issued by this Court would not cause Defendants to suffer any harm whatsoever if allowed to continue in force pending appeal, let alone the *irreparable* harm to the State of Tennessee that Defendants must show to justify such a stay, Plaintiffs respectfully request that the Court deny Defendants' motion.

ARGUMENT

I. DEFENDANTS MISSTATE THE STANDARD FOR GRANTING A STAY PENDING APPEAL.

Defendants cite to *Baker v. Adams County/Ohio Valley School Board*, 310 F.3d 927, 928 (6th Cir. 2002), but do not accurately state the standard for granting a stay pending appeal set forth in that case and other Sixth Circuit cases. The actual standard established by the Sixth Circuit is as follows:

> The court balances the traditional factors governing injunctive relief in ruling on motions to stay pending appeal. Thus, we consider (1) whether the defendant has a *strong or substantial* likelihood of success on the merits; (2) whether the *defendant* will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies.

Id. (emphases added); *see also Family Trust Found. of Ky., Inc. v. Kentucky Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004). Further, "the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue." *Baker*, 310 F.3d at 928. "[I]n order to justify a stay of the district court's ruling, the defendant must demonstrate at least serious questions going to the merits and *irreparable harm that decidedly outweighs the harm that will be inflicted on others* if a stay is granted." *Id.* (emphasis added). It bears emphasis that Plaintiffs have already established their entitlement to the preliminary injunction that this Court entered and that *Defendants* bear the burden of making the showing required for a stay of this Court's ruling.

In addition, it is insufficient for a defendant to assert, in conclusory fashion, that it would suffer irreparable harm if a stay is not granted. "In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some *evidence* that the harm has occurred in the past and is likely to occur again. . . . [T]he movant must address each factor, regardless of its relative strength, providing *specific facts and affidavits supporting assertions that these factors exist.*" *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (emphasis added and citations omitted).

Defendants do not come close to meeting their burden to obtain a stay of this Court's injunction. Defendants have not submitted any facts or affidavits providing evidence that they will suffer any harm from this limited injunction, much less irreparable harm. Defendants have not established that they have a "strong or substantial" likelihood of succeeding on the merits of their appeal. *Baker*, 310 F.3d at 928. Defendants do suggest that their appeal satisfies the lesser

standard of raising "serious questions going to the merits," *see* Def. Mem. at 2-3, but under that lesser showing they must meet the correspondingly increased burden of demonstrating that, if this Court's injunction is not stayed, the State of Tennessee or its citizens would suffer "irreparable harm" that "decidedly outweighs" the harm to Plaintiffs. *Baker*, 310 F.3d at 928. Defendants cannot meet this burden.

Defendants have not shown that the State or its citizens would suffer actual harm absent a stay, much less provided *evidence* of *irreparable* harm. Instead, they argue that "Plaintiffs will not be irreparably harmed by a stay pending appeal." Def. Mem. at 3. That is not the standard, however. When a defendant seeks a stay of the district court's injunction pending appeal, the focus is *not* on "whether Plaintiffs-Appellees would be irreparably harmed in the absence of the injunction," but on "whether *Appellants* [*i.e.*, the State Defendants] would be irreparably harmed if this court fails to *stay* the injunction." *Family Trust Found.*, 388 F.3d at 228 (emphasis in original). In any event, Defendants' assertion that Plaintiffs will not be irreparably harmed by issuance of a stay is manifestly incorrect, including in light of the irreparable harm that this Court already found that Plaintiffs would suffer in the absence of a preliminary injunction.

In sum, Defendants have failed to accurately state the standard for granting a stay of the Court's injunction pending appeal, and they cannot satisfy the actual standard for such a stay.

II. DEFENDANTS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON APPEAL.

In order to satisfy their burden of showing a likelihood of success on the merits, Defendants must essentially persuade this Court "that there is a likelihood of reversal" of its decision granting Plaintiffs' motion for a preliminary injunction. *Michigan Coal.*, 945 F.2d at 153. Defendants cannot meet that standard. As this Court recently concluded, "all relevant federal authority indicates that the plaintiffs in this case are indeed likely to prevail on their

claims that the Anti-Recognition Laws are unconstitutional." Memorandum Decision at 3 (Doc. No. 67) ("Decision").

Defendants argue that the Court's decision misapplied the rational basis standard. Defendants are incorrect. As the Court observed, since the Supreme Court's decision in *United States v. Windsor,* 133 S. Ct. 2675 (2013), numerous federal courts "have found that same-sex marriage bans and/or anti-recognition laws are unconstitutional because they violate the Equal Protection Clause and/or the Due Process Clause, even under 'rational basis' review, which is the least demanding form of constitutional review." Decision at 13. Defendants have offered no reason for this Court to revisit its conclusion that Plaintiffs are likely to succeed on the merits in light of these recent federal decisions, nor have Defendants shown that they are likely to succeed on the merits of their appeal.

III. DEFENDANTS HAVE NOT SHOWN THAT THEY WOULD SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY, AND THE ENTRY OF A STAY WOULD CAUSE SUBSTANTIAL, INDEED IRREPARABLE, HARM TO PLAINTIFFS.

As noted above, Defendants misstate their burden when they argue that they need only show that Plaintiffs would not suffer irreparable injury if a stay pending appeal is entered. To the contrary, it is *Defendants* who must establish that they will suffer irreparable injury, and they must also show that their irreparable harm "decidedly outweighs" the harm that Plaintiffs would suffer if a stay is granted. *Baker*, 310 F.3d at 928. They cannot satisfy this burden.

In effect, Defendants ask the Court to reverse its determination that because "plaintiffs are likely to prevail on their claims that the Anti-Recognition Laws are unconstitutional, it is axiomatic that the continued enforcement of those laws will cause them to suffer irreparable harm." Decision at 15 & n.11 (collecting cases, including *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)). Without presenting any evidence, they ask this Court to revisit its conclusions regarding the harms that

Plaintiffs Valeria Tanco and Sophy Jesty would suffer from non-recognition of their marriage in connection with the upcoming birth of their first child and their ongoing care of that child. Def. Mem. at 3-4. Defendants also ask the Court to reverse its determination that a preliminary injunction is warranted because plaintiffs and their children are suffering "dignitary and practical harms that cannot be resolved through monetary relief." Decision at 15; *see also* Def. Mem. at 4. In so arguing, Defendants repeat their own arguments, previously rejected by the Court, that such harms are insufficient to establish irreparable injury warranting an injunction. *See* Def. Mem. at 4. Although Defendants attempt to minimize Plaintiffs' harms by characterizing them as "reputational," *id.*, this Court has already correctly concluded that Plaintiffs are suffering "harms against which the Constitution protects," Decision at 16, and that permitting those constitutional harms to continue while Defendants' appeal proceeds would cause Plaintiffs, not Defendants, to be irreparably harmed.

Not only have Defendants failed to offer any reason for the Court to revisit its decision that these harms to Plaintiffs constitute irreparable harms warranting a preliminary injunction, they also have not attempted to demonstrate that the limited injunction ordered by the Court would cause the State of Tennessee or its citizens to suffer any countervailing harm whatsoever. Much less have they attempted to show that any such harm to the State would be "irreparable" or would outweigh the real, ongoing, and severe harm that Tennessee's Anti-Recognition Laws inflict on Plaintiffs and their children each day they remain in effect.[2] *Cf.*, *Obergefell*, 2013 WL

[2] Defendants also argue that a preliminary injunction is appropriate only to preserve the status quo until a trial on the merits can be held. *See* Def. Mem. at 4-5. Were Defendants correct, a preliminary injunction could *never* be issued in a constitutional challenge to a state statute or other government action (because such injunctions alter the status quo), and if such an injunction were issued, it would *always* have to be stayed pending appeal. The law, of course, is to the contrary. *See U.S. Student Assoc. Found. v. Land*, 546 F.3d 373 (6th Cir. 2008) (denying motion for stay pending appeal of preliminary injunction enjoining Michigan's practice of rejecting a voter's registration when the voter's identification card is returned as undeliverable). The Sixth Circuit has repeatedly emphasized in the preliminary injunction context that there is

7869139, at *22 ("[T]here is absolutely no evidence that the State of Ohio or its citizens will be harmed by the issuance of a permanent injunction restraining the enforcement of the marriage recognition ban provisions against the Plaintiffs in this case. Without an injunction, however, the harm to Plaintiffs is severe.").

In short, Defendants have not shown that they will suffer irreparable harm, and the entry of a stay would "substantially injure other interested parties"—namely, Plaintiffs and their children. *Baker*, 310 F.3d at 928. Indeed, the Defendants' unsupported and erroneous argument that Plaintiffs Valeria Tanco and Sophy Jesty could somehow replicate the protections offered to opposite-sex married couples under Tennessee law upon the birth of their child, and that it is they who are creating harm to themselves (and to their child) if they are unable to do so, Def. Mem. at 3-4, is itself testament to the kind of practical and dignitary injuries imposed on same-sex couples by continued enforcement of the Anti-Recognition Laws.[3] Plaintiffs are substantially injured by any requirement that they employ separate (and often uncertain) methods to replicate a fraction of the legal protections granted to other married couples as a matter of course rather than being treated equally under the Constitution. Moreover, Defendants have not offered *evidence* rebutting Plaintiffs' showings in connection with the preliminary injunction that, absent this Court's preliminary injunction, Dr. Jesty would not benefit from the statutory presumption that both spouses are the legal parents of a child born during a marriage (Tenn.

---

not "any particular magic in the phrase 'status quo,'" that "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo," and that "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (quoting *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir.1978) (internal quotation marks omitted; alterations in original).

[3] Defendants' suggestion that Plaintiffs Tanco and Jesty could secure adequate protection merely by executing a "visitation" agreement, Def. Mem. at 4, disregards the comprehensive protections given to married parents and their children, including the certainty that both spouses have a legally protected relationship with the couple's child from the moment of birth.

Code Ann. § 36-2-304), and that this Court's preliminary injunction is necessary to ensure that Dr. Jesty will be able to make medical decisions for their child. *See* Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction at 8, 38 (Docket No. 30). In sum, Defendants have not satisfied the second and third requirements for a stay. *Id.*

IV. THE PUBLIC INTEREST STRONGLY DISFAVORS A STAY IN THIS CASE.

As this Court correctly found in entering its preliminary injunction, "an injunction would serve the public interest because the Anti-Recognition Laws are likely unconstitutional." Decision at 18. "It is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). That principle is equally applicable to Defendants' request for a stay as it was to the Court's decision to issue the preliminary injunction. Accordingly, this factor also weighs heavily against a stay of the Court's injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion for a stay pending appeal.

Dated: March 19, 2014

Respectfully submitted,

/s/ Abby R. Rubenfeld
Abby R. Rubenfeld (B.P.R. No. 6645)
RUBENFELD LAW OFFICE, PC
2409 Hillsboro Road, Suite 200
Nashville, Tennessee 37212
Tel.: (615) 386-9077
Fax: (615) 386-3897
arubenfeld@rubenfeldlaw.com

/s/ Maureen T. Holland
Maureen T. Holland (B.P.R. No. 15202)
HOLLAND AND ASSOCIATES, PLLC
1429 Madison Avenue
Memphis, Tennessee 38104-6314
Tel.: (901) 278-8120
Fax: (901) 278-8125
mtholland@aol.com
Admitted Pro Hac Vice

/s/ William L. Harbison
William L. Harbison (B.P.R. No. 7012)
Phillip F. Cramer (B.P.R. No. 20697)
J. Scott Hickman (B.P.R. No. 17407)
John L. Farringer IV (B.P.R. 22783)
SHERRARD & ROE, PLC
150 3rd Avenue South, Suite 1100
Nashville, Tennessee 37201
Tel.: (615) 742-4200
bharbison@sherrardroe.com
pcramer@sherrardroe.com
shickman@sherrardroe.com
jfarringer@sherrardroe.com

/s/ Shannon P. Minter
Shannon P. Minter (CA Bar No. 168907)
Christopher F. Stoll (CA Bar No. 179046)
Asaf Orr (CA Bar No. 261650)
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Tel.: (415) 392-6257
Fax: (415) 392-8442
sminter@nclrights.org
cstoll@nclrights.org
aorr@nclrights.org
Admitted Pro Hac Vice

Attorneys for Plaintiffs

/s/ Regina M. Lambert
Regina M. Lambert (B.P.R. No. 21567)
REGINA M. LAMBERT, ESQ.
7010 Stone Mill Drive
Knoxville, Tennessee 37919
(865) 679-3483
(865) 558-8166
lambertregina@yahoo.com
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system:

Martha A. Campbell
Kevin G. Steiling
Tennessee Attorney General's Office
General Civil Division
Cordell Hull Building, Second Floor
P. O. Box 20207
Nashville, Tennessee 37214

Attorneys for Defendants

Jonathan Scruggs
Alliance Defending Freedom
1511 N. 90th Street
Scottsdale, Arizona 85260

Attorney for Amicus Curiae Family Action Council of Tennessee

and via regular mail upon:

Susan G. Martin
602 Pemberton Drive
Lebanon, TN 37087

Pro se, Motion to Intervene Pending

/s/ Scott Hickman